

# Exhibit D

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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SECURITIES INVESTOR PROTECTION  
CORPORATION,

Plaintiff-Applicant,

v.

22-CV-06502

BERNARD L. MADOFF INVESTMENT  
SECURITIES LLC,

Defendant.

Oral Argument

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New York, N.Y.  
October 13, 2022  
4:00 p.m.

Before:

HON. JED S. RAKOFF,

District Judge

APPEARANCES

BAKER & HOSTETLER  
Attorneys for Trustee.

BY: MATTHEW DAVID FEIL  
TORELLO H. CALVANI

FRIEDMAN KAPLAN  
Attorney for Multistrategy.

BY: ROBERT J. LACK

JENNER & BLOCK  
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BY: RICHARD LEVIN

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Attorney for Barclays Bank.

BY: CHRISTOPHER B. EMCH  
MARC GOTTRIDGE

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Attorney for Delta National.

BY: JAMES L. BROMLEY

(Case called; appearances noted)

THE COURT: Good afternoon. We're here for the motion to appeal. I assume not everyone at the table is going to talk but have you worked out who want to be the primary spokespersons?

MR. LEVIN: Yes, your Honor. I was going to start and give a brief explanation about who was going to talk and what we were going to talk about.

THE COURT: Sure. Why don't you go to the podium.

MR. LEVIN: Sure.

Your Honor, I and the other two counsel speaking today are speaking on behalf of all seven of the defendants below moving parties here. We're here separately, because the bankruptcy court below required separate briefing on all these matters, but we're --

THE COURT: She must have been a glutton for punishment.

MR. LEVIN: I don't want to make assumptions, your Honor, and we're glad that it's proceeded on a consolidated basis here.

We're going to divide the argument into three parts. I'm going to start with a review of the grounds for the motion for leave to appeal and -- two of the three grounds, and then Mr. Lack is going to take over on the substantive issue, the primary substantive issue on section 546(e). And Mr. Gottridge

1 is going to address what we're calling the separate securities  
2 contract issue.

3 THE COURT: All right.

4 MR. LEVIN: So, your Honor, as you well know, a motion  
5 for leave normally requires three factors, and I'm going to  
6 state them not in the usual order, because I'm going to discuss  
7 two of them out of order. First is whether there's a  
8 controlling issue of law; second, whether the decision of the  
9 issue would materially affect the advance -- advance the  
10 litigation below; and, third, whether there is a substantial  
11 ground for difference of opinion on that controlling issue of  
12 law. Courts have added an exceptional circumstances  
13 requirement, but, in the end, I think it's a practical  
14 question, your Honor.

15 The final judgment rule is important to prevent  
16 piecemeal litigation. We acknowledge that, but Congress  
17 enacted interlocutory appeals to provide some give in the  
18 joints on that where it made sense as a practical matter. And  
19 the courts have recognized --

20 THE COURT: Well, I think, from the briefing, the real  
21 dispute is on your third factor.

22 MR. LEVIN: Absolutely.

23 THE COURT: So you may want to turn to that.

24 MR. LEVIN: Fine.

25 Well, I'm going to just talk briefly about the

1 standard for the third factor. Mr. Lack is going to then  
2 address the substance of the third factor.

3 The Second Circuit has said there are two ways to --  
4 two ways something can create a substantial ground for a  
5 difference of opinion. One is conflicting decisions. In this  
6 case, this Court's decision below on *Cohmad* was the only  
7 decision ever on this issue, so there can't be conflicting  
8 decisions, but the other ground the Second Circuit recognized  
9 --

10 THE COURT: I'm having trouble. Could you slow down a  
11 bit?

12 MR. LEVIN: The other basis for substantial grounds  
13 for difference of opinion is if it is an issue of first  
14 impression in the circuit, and if that's the case, the Second  
15 Circuit has also said in the *Flor* case --

16 THE DEPUTY CLERK: Spell that, please.

17 MR. LEVIN: *Flor*, F-l-o-r.

18 -- that the district court must analyze the strength  
19 of the arguments in opposition to the challenged ruling when  
20 deciding whether the issue is truly one on which there is  
21 substantial grounds for dispute.

22 As I said, this is definitely an issue of first  
23 impression. It was when this Court decided *Cohmad* -- and this  
24 further interpretation of *Cohmad* that we are addressing today  
25 is similarly an issue of first impression. No other court has

1 addressed this application of 546(e) to innocent subsequent  
2 transferees. And as the trustee's dogged opposition to the  
3 implications of this Court's *Cohmad* ruling shows, it is a  
4 difficult issue, even though the trustee attempts to  
5 characterize it as just a simple interpretation.

6 Your Honor, with that, I turn it over to Mr. Lack. I  
7 did have one exhibit, just listing the 21 decisions that the  
8 bankruptcy court has already decided. That goes to the issue  
9 of materially advanced --

10 THE COURT: Please feel free to hand it up, and if I  
11 have any trouble with insomnia tonight, I'll know how to cure  
12 it.

13 MR. LEVIN: It's all on one page. It will make it  
14 easy.

15 THE COURT: Go ahead.

16 MR. LACK: Thank you, your Honor.

17 Substantial grounds for difference of opinion exist  
18 here, because the bankruptcy court's ruling on the -- misread  
19 this Court's decision in *Cohmad*, not only in these seven cases,  
20 but in --

21 THE COURT: Well, let me just make sure that you agree  
22 that other than the way that you're reading my decision, which  
23 I may agree with or I may disagree with, but other than that,  
24 there's really no other decision that's weighed in on the issue  
25 that you want to now appeal?

1 MR. LACK: That's correct. Other than Judge Morris'  
2 decision in the bankruptcy court which squarely dealt with the  
3 question of the innocent subsequent transferee, and your  
4 Honor's *Cohmad* decision which we believe, properly construed,  
5 would come to the opposite conclusion, there is no other  
6 decision.

7 THE COURT: Okay. Go ahead.

8 MR. LACK: And, as the chart you're just been given  
9 shows, there are 21 cases that so far have been effected by the  
10 misreading of *Cohmad* by the bankruptcy court. And in the  
11 absence of intervention by this Court, there will be scores of  
12 others that will be similarly misdecided, erroneously decided,  
13 because there are approximately 60 additional cases in the  
14 pipeline, in various stages of briefing, set for argument, from  
15 next week through the spring of 2023, raising exactly the same  
16 issue and the bankruptcy court has consistently decided  
17 adversely to the defendants.

18 I mean, the trustee here does not --

19 THE COURT: Let me interrupt you here on that point,  
20 because I'm glad you made me aware of those, you know, other  
21 matters in the pipeline. Well, while I make no guarantee, I  
22 will do my very best to get you at least a bottom line decision  
23 on these motions by the end of October. Hopefully, it will be  
24 more than just the bottom line. If it is the bottom line, of  
25 course, an opinion will follow in due course; but I do



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1 understand the need for some expedition and, really, I wasn't  
2 planning on going trick-or-treating, so October 31 sounds like  
3 an open day.

4 MR. LACK: Thank you, your Honor. That would be  
5 appreciated.

6 I think, in the interest of judicial administration  
7 efficiency, that will be well worthwhile. The trustee here  
8 does not dispute that Madoff was a stockbroker, that Fairfield  
9 Sentry was a financial institution, or that the initial  
10 transfers from Madoff -- I'll refer to Bernard L. Madoff  
11 Investment Securities, LLC as just Madoff for simplicity.  
12 There's no dispute by the trustee that the initial transfers  
13 from Madoff to Sentry were settlement payments or in connection  
14 with a securities interest, and the trustee does not dispute  
15 with respect to the transfers that are at issue in these  
16 motions that they were all more than two years before the  
17 petition date and, therefore, cannot be pursuant under section  
18 548(a)(1)(A) of the Bankruptcy Code. In other words, the  
19 section 546(e) Safe Harbor applies by its terms to the initial  
20 transfers from Madoff to Sentry. The transfers are on their  
21 face not avoidable.

22 But in *Cohmad* --

23 THE COURT: So what it sounded like you were saying,  
24 but maybe I misunderstood, is that the availability of a  
25 subsequent transferee to avoid as a defense to the trustee's

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1 ability to avoid an initial transfer should turn on the  
2 knowledge of the subsequent transferee even though the  
3 subsequent transferee has an independent good faith defense.

4 Am I understanding what you're saying?

5 MR. LACK: Not exactly, your Honor.

6 There are two aspects of this. There's two defenses.  
7 First, there's a defense to the initial transfer under 546(d).  
8 Then there's a defense to the subsequent transfer under 550(b).  
9 There's also a good faith for value defense.

10 Incidentally, in the initial transfer you also have  
11 good faith for value under 548(b) -- 548(c). I'm sorry. But  
12 the point here is, as your Honor recognized in *Cohmad*, and as  
13 other courts have said, that the subsequent transferee can  
14 raise the 546(e) defense to the initial transfer even if that  
15 defense was not raised by the initial transferee, as was the  
16 case here with Fairfield Sentry settled the claim against them.  
17 So even though the subsequent transferees also have a good  
18 faith defense, they also have the right, as a matter of due  
19 process, to raise the 546(e) defense as to the initial  
20 transfer, even if it wasn't raised by the initial transferee,  
21 as it wasn't by Fairfield Sentry here. So we --

22 THE COURT: You know, it's been a while since I  
23 decided *Cohmad*. I was practically just a judge in diapers at  
24 that time. But my recollection is that what I held there was  
25 that subsequent transferees who knew about the fraud could not

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1 raise this defense to avoidance of the initial transfer. I  
2 don't know that I addressed, other than what you're saying by  
3 way of inference, the issue that you're now presenting.

4 MR. LACK: That's correct. That's correct, your  
5 Honor.

6 You addressed the question of the initial transferee  
7 having actual knowledge of Madoff's fraud, meaning knowing --  
8 actually knowing that Madoff was not trading securities. You  
9 held an initial transferee who actually knew Madoff's fraud  
10 could not assert the 546(e) Safe Harbor, and you also held that  
11 a subsequent transferee that actually knew of Madoff's fraud  
12 could not assert the 546(e) Safe Harbor. But you did not  
13 specifically deal with the situation of the innocent subsequent  
14 transferee, and it is our position that the rationale, the  
15 reasoning of your decision in *Cohmad* makes it clear that had  
16 you reached that point, you would have decided that an initial  
17 -- an innocent subsequent transferee can indeed assert the  
18 546(e) defense, because the innocent transferee is within the  
19 class of persons that Congress sought to protect by the section  
20 546(e) Safe Harbor.

21 And it was only because those initial and subsequent  
22 transferees who had actual knowledge were not within the class  
23 of people Congress sought to protect, because they knew that  
24 there was not, in fact, a securities contract involved, that  
25 your Honor felt -- held in *Cohmad* that they could not assert

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1 the 546(e) defense that would otherwise be available, because  
2 here it's conceded that absent the argument about an actual  
3 knowledge of the initial transferee, 546(e) would apply,  
4 because there's no doubt that there was here a transfer by a  
5 stockbroker to a financial institution in connection with a  
6 securities contract.

7 In fact, here there were two securities contracts  
8 involved: A contract between Madoff and Sentry and a contract  
9 between Sentry and the various defendants. And so the only  
10 question is is there something that would disable the  
11 particular defendants here, the subsequent transferees, from  
12 using the 546(e) defense.

13 And in *Cohmad* your Honor identified --

14 THE COURT: Why do we need this protection for your  
15 clients if they have the good faith defense?

16 MR. LACK: Well, because the good faith defense is a  
17 much weaker defense than the 546(e) defense. The 546(e)  
18 defense is a structural defense that arises in a situation  
19 where there is a transfer by a stockbroker in connection with a  
20 securities contract. It applies with only one exception, your  
21 Honor, to *Cohmad*, which is actual knowledge of Madoff's fraud.  
22 The 546 -- the good faith defense under 550(b) can be defeated  
23 by much less than a showing of actual knowledge. That's not  
24 the standard. The actual knowledge standard is a much more  
25 difficult standard to -- for the trustee.

1 In fact, the trustee does not plead to any of the  
2 defendants, subsequent transferee defendants before you had  
3 actual knowledge of Madoff's fraud. So it's a much better --

4 THE COURT: There is something a little odd, that the  
5 availability of a defense of avoidance of the initial -- of the  
6 initial transfer should somehow turn on the subsequent  
7 knowledge or innocence of a subsequent transferee years later.

8 MR. LACK: The way -- I think the best way to look at  
9 this, your Honor, is that the avoidability of the initial  
10 transfer depends on the structure, the participants, whether  
11 there's a qualifying participant and a qualifying transaction.  
12 That is what triggers the 546(e) defense. If you have a  
13 qualifying participant, such as a stockbroker or a financial  
14 institution and a qualifying transaction, such as a settlement  
15 payment or a transfer connection with securities contract,  
16 section 546(e) applies, except, as you said in *Cohmad*, if the  
17 defendant who is the subject of suit, the particular  
18 transferee, had actual knowledge of Madoff's fraud, in which  
19 case you ruled they could not assert the defense, because  
20 Congress was not seeking to protect them if they knew there  
21 wasn't actually a securities contract involved.

22 So it isn't a question of the -- the 546(e) defense,  
23 remember, the only -- the only exception to 546(e) is if it  
24 applies structurally, is for a claim for intentional fraudulent  
25 transfer under 548(a)(1)(A). There is no exception to 546(e)

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1 that is based on the state of mind of the transferee. The only  
2 thing that triggers an exception is the intent of the  
3 transferor in making the initial fraudulent transfer. But the  
4 transferee's mental state is irrelevant to 546(e), as written  
5 by Congress.

6 The only -- the gloss you put on 546(e) in *Cohmad* was,  
7 well, if in fact the defendant who's being sued actually knew  
8 that Madoff wasn't trading securities, then it makes no sense  
9 to give them a protection which was designed to protect the  
10 legitimate expectations of investors, that they were engaging  
11 in bona fide securities transactions. And certainly the  
12 defendants here had every reason to believe that the -- that  
13 the contracts between Madoff and Sentry were bona fide, that  
14 the contracts between Sentry and themselves were bona fide.  
15 They had no knowledge, and there's no allegation that they had  
16 any knowledge that Madoff wasn't trading securities.

17 So there's no reason to provide an exception for a  
18 Safe Harbor that would otherwise apply here, and that's why --  
19 that was the reason it -- that this Court focused in *Cohmad* on  
20 the knowledge of the particular defendant. It was that the  
21 Safe Harbor existed as to the initial transfer. But the  
22 question was, was the particular defendant disabled from  
23 asserting, as your Honor put it in *Cohmad*, if the trustee  
24 sufficiently alleges that the transferee from whom he seeks to  
25 recover a fraudulent transfer knew of Madoff's security fraud,

1 that transferee cannot claim the protections of section 546(e)  
2 Safe Harbor.

3 And so your Honor should make clear and grant leave to  
4 appeal to make clear that, under *Cohmad*, a subsequent  
5 transferee that has -- does not have actual knowledge is not  
6 disabled from asserting a section 546(e) defense that would  
7 otherwise exist as to the initial transfer.

8 THE COURT: All right. Thank you very much.

9 There was one other person, yes, who wanted to speak  
10 --

11 MR. GOTTRIDGE: Yes, your Honor.

12 THE COURT: -- before we get to the defense.

13 MR. GOTTRIDGE: Good afternoon again, your Honor.

14 So there's really, as we say it, two holdings of  
15 *Cohmad* that we ask the bankruptcy court to apply, and Mr. Lack  
16 really addressed what we think is the first fundamental error  
17 of the bankruptcy court in that regard, which is that it really  
18 goes to this question of the *Cohmad* -- sort of the first *Cohmad*  
19 holding, which is based on actual knowledge.

20 As Mr. Lack said, it creates -- it's not an exception  
21 to the Safe Harbor, which I think everybody agrees these  
22 transactions are Safe Harbor. They meet all of the 546(e)  
23 prerequisites. The question is whether a particular defendant  
24 that's being sued had actual knowledge that Bernie Madoff  
25 wasn't trading securities, because such a defendant, as your

1 Honor ruled, doesn't have a reasonable expectation that an  
2 innocent one would have.

3 And the judge below, in our view, made a serious  
4 mistake, because what she did essentially was to say: I'm not  
5 even looking at what the subsequent transferee knew; if the  
6 initial transferee, Fairfield Sentry, is alleged to have  
7 knowledge, that's the end of the ball game for you; I don't  
8 even consider the actual knowledge of the subsequent  
9 transferee. Which, in our view, is entirely inconsistent with  
10 your Honor's ruling in *Cohmad*.

11 But there was also a second problem with what the  
12 bankruptcy court did, and that's what I'd like to focus on now.  
13 It really relates to the second *Cohmad* holding, if you will.  
14 We're calling it a separate securities contract holding. It  
15 starts at page eight of the Westlaw pagination of your Honor's  
16 *Cohmad* decision and kind of goes to the end. And what the  
17 Court said there was separate and apart from the customer  
18 agreements that BLMIS, the Madoff securities entity, had with  
19 Fairfield Sentry or another feeder fund, the requirement under  
20 546(e) that there be a securities contract that has a  
21 relationship with the transaction that can be fulfilled for the  
22 very same transactions by multiple contracts.

23 And the Court actually said that, in the scenario that  
24 we have here, where a subsequent transferee defendant caused  
25 Fairfield Sentry to make the withdrawal that constitutes the



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1 initial transfer, because it made a request to Fairfield Sentry  
2 that Fairfield Sentry -- for the redemption of its shares in  
3 Fairfield Sentry, in that scenario, 546(e) applies  
4 independently of whatever customer agreement existed between  
5 Madoff Securities on the one hand and Fairfield Sentry on the  
6 other, because you've also got -- and the Court found at page 8  
7 that these were securities contracts under the meaning of  
8 546(e).

9           You've got subscription agreements and you've got  
10 redemption requests and the agreements that relate to the  
11 redemption request. In this case, the trustee pleaded exactly  
12 what is required to fit. It just fits like a T to what your  
13 Honor held when your Honor explained at page 9 in the case,  
14 quote, in which the trustee alleges that a withdrawal of funds  
15 by an investment fund from its Madoff Securities customer  
16 account occurred because an investor in the fund sought  
17 redemption of its investment under the terms of its investment  
18 contract. The situation appears to fit within the plain terms  
19 of section 546(e), and that's exactly what the trustee has  
20 pleaded.

21           They pleaded here that the defendants entered into  
22 subscription agreements with Fairfield Sentry. They've pleaded  
23 that they subscribed for and got Fairfield Sentry shares, and  
24 they ultimately directed redemption requests to Fairfield  
25 Sentry. They even go on to plead that Fairfield Sentry honored

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1 the redemption requests and withdrew funds from BLMIS accounts  
2 precisely "in order to pay" redemption as requested by the  
3 defendants.

4 And they even say that, as a result of the honoring of  
5 these redemption requests by Fairfield Sentry, "portions of the  
6 Fairfield Sentry initial transfers were subsequently  
7 transferred either directly or indirectly to or for the benefit  
8 of" each of the defendants to the subsequent transferee  
9 defendants.

10 So the Court's holding, the second holding, the  
11 separate securities contract holding, is entirely satisfied  
12 that the scenario that your Honor laid out matches exactly the  
13 fact pattern alleged by the trustee. And the trustee says,  
14 well, there may be factual issues. There are no factual  
15 issues. Everything that makes out the defense and makes out  
16 this separate pathway to 546(e) protection is from the  
17 trustee's own allegations. You don't need to go any further.

18 Now, at the end, in the concluding paragraph of the  
19 opinion, in *Cohmad*, at page 10, this Court said that it was the  
20 bankruptcy court's obligation to adjudicate this issue.  
21 Specifically, what the Court ruled was, "to the extent a  
22 defendant claims protection under section 546(e) under a  
23 separate securities contract as a financial institution or  
24 financial participant, the bankruptcy court must adjudicate  
25 those claims in the first instance consistent with this

1 opinion." That's at page 10.

2 And the Court said "must." It didn't say "may." And  
3 the Barclays defendant and the other defendants that raised  
4 this second pathway laid out in their papers -- I argued this  
5 in front of Judge Morris, and we submitted the transcript as  
6 part of our motion papers on this motion. It was all laid out  
7 for the bankruptcy court. And what did the bankruptcy court  
8 do? It did not adjudicate these claims at all. It failed  
9 entirely to address this separate pathway.

10 And there's an important point to be made here, which  
11 is this actual knowledge issue that the trustee raised and the  
12 bankruptcy court agreed with as to Fairfield Sentry's actual  
13 knowledge that, you know, there was no trading of Madoff  
14 securities. Whatever relevance that may have in the context of  
15 a securities contract between Madoff Securities and Fairfield  
16 Sentry, it's got nothing to do with this second pathway,  
17 because the contracts, the securities contracts on which we are  
18 relying on for this second pathway are contracts between  
19 Fairfield Sentry and the subsequent transferees. Madoff is not  
20 a party to them.

21 And this is an important point as well, your Honor.  
22 Was Madoff a Ponzi scheme? Yes, we all know that now. Nobody  
23 has alleged that Fairfield Sentry was a Ponzi scheme. No one  
24 has alleged that the Fairfield Sentry shares that our clients  
25 bought and sold -- because, remember, we weren't dealing with

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1 Madoff. We weren't dealing with Madoff Securities. We were  
2 dealing with Fairfield. Nobody has alleged that those were not  
3 actual shares. Nobody has alleged that the securities  
4 contracts between Fairfield Sentry and the defendants here, the  
5 subsequent transferee defendants were not valid securities  
6 contracts.

7 So it was really incumbent upon the bankruptcy court  
8 to address this issue, and it completely failed to address it.  
9 And that's particularly egregious, your Honor, because the  
10 bankruptcy judge ruled as she did on the first issue, the issue  
11 that Mr. Lack addressed -- she basically read us out of court  
12 on the basis that Fairfield Sentry had actual knowledge, that  
13 was all to do with the securities contracts between BLMIS,  
14 Madoff Securities and Fairfield, but she didn't even consider  
15 this other issue, which was fully briefed and fully argued and  
16 which your Honor said she must adjudicate.

17 Now, the trustee has an answer to it. Bankruptcy  
18 court, by the way, had no answer. The Court didn't say, I'm  
19 not reaching this issue because... We just don't know. But  
20 the trustee is now offering some after the fact rationalization  
21 which really don't wash.

22 So what the -- and this really goes to the point of  
23 whether there's substantial grounds for difference of opinion,  
24 right, because in the *Enron* case that we cite at page 14 of our  
25 brief, a Southern District case from 2006, a substantial ground

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1 for difference of opinion exists where there is, quote, genuine  
2 doubt as to whether the bankruptcy court applied the correct  
3 legal standard. Okay?

4 Here -- that's the minimum. There's got to be  
5 genuine. Here we've got way more than genuine doubt. We know  
6 for a fact that the bankruptcy court refused or declined or  
7 ignored or whatever -- it did not apply the correct standard.  
8 This Court gave the bankruptcy court the standard, and the  
9 bankruptcy court just ignored it. That was -- now, as for  
10 these rationalizations, the main argument they make, the  
11 trustee makes, is, oh, well, that was a conditional ruling in  
12 *Cohmad*. It was a second ruling -- it was only there because,  
13 at the time *Cohmad* was decided in 2013, your Honor had ruled  
14 but the Second Circuit had not yet accepted that the securities  
15 -- that the BLMIS account agreements could function as  
16 securities contracts under 546(e).

17 And then in *Fishman*, which was decided the next year  
18 by the Second Circuit, the circuit said that your Honor was  
19 correct on that, and their view, at that point, the entire  
20 second holding of *Cohmad* falls away. It just magically  
21 disappears, because it became -- "academic" is the word that  
22 they use. And the reason they say that is just because, you  
23 know, they see no more use for that, but there very well may be  
24 a use for it.

25 For example, if your Honor were to rule that the

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1 bankruptcy court got it right on the point Mr. Lack raised,  
2 then clearly the point that I'm now addressing would be a valid  
3 and viable argument. Similarly, if your Honor were to agree  
4 with us on the first point but the Second Circuit were to  
5 disagree that's a viable issue, so we were really entitled to a  
6 ruling by the bankruptcy court -- the bankruptcy court  
7 apparently thought they didn't have to answer this question.  
8 And what we're looking for now is what we thought we had in  
9 2013, which is a clear instruction that these facts, as  
10 pleaded, satisfy this alternative pathway. And that is a valid  
11 way to get to 546(e), and it's a way that does not implicate  
12 the actual knowledge of Fairfield Sentry at all.

13 Again, our clients were actually dealing in real  
14 securities. They had reasonable expectations. They were  
15 legitimate security investors in a legitimate security. So  
16 whatever the issue was, Fairfield Sentry, and what it knew  
17 about Madoff, has nothing to do with whether we should be  
18 disentitled to 546(e) protection at a minimum under the second  
19 pathway.

20 THE COURT: Thank you very much. That's very helpful.

21 I'll hear now from the trustee.

22 MR. FEIL: Good evening, your Honor. Matthew Feil for  
23 the trustee.

24 I'll focus on the first question that Mr. Lack  
25 discussed, and my colleague, Mr. Calvani I think will address

1 the comments Mr. Gottridge just made.

2 With respect to the question one referring to  
3 Mr. Lack's comments, the defendants claim the court misapplied  
4 *Cohmad* by stripping them of their right to protections involved  
5 in 546(e). They argue that they have an independent right to  
6 assert that defense to avoidance even where that defense is not  
7 available to the initial transferee who received the transfer  
8 to be avoided; but defendants fail to identify the basis for  
9 this purported independent right.

10 They acknowledge that the two rulings in *Cohmad*, the  
11 two bottom line orders that your Honor put forth at the  
12 beginning, do not explicitly convey that right. The first part  
13 of the bottom line ruling precludes an initial transfer from  
14 asserting 546(e). All parties agree on that.

15 The second part of the bottom line order applies where  
16 there is an innocent initial transferee, one without actual  
17 knowledge. That provision doesn't apply here because all of  
18 these defendants received transfers from Fairfield Sentry, and  
19 the trustee's plausibly allege Fairfield Sentry's actual  
20 knowledge. Instead, defendants argue that this right is  
21 implicit in *Cohmad* for three reasons, and they ask this Court  
22 to now make that explicit.

23 First, they argue that *Cohmad*'s one caveat, the part  
24 that bars a subsequent transferee with actual knowledge from  
25 asserting the innocent initial transferee's defense to 546(e)

1 provides them with their own defense to 546(e).

2 Second, they argue, as innocent subsequent  
3 transferees, they are who Congress intended for 546(e) to  
4 protect.

5 And, finally, they argue it would be unfair and  
6 inequitable to deny an innocent subsequent transferee  
7 protection of 546(e) simply because the initial transferee  
8 actual knowledge.

9 I'd like to address each of those in turn quickly if I  
10 may. First, the defendants argue that because *Cohmad* bars the  
11 subsequent transferee with actual knowledge from raising 546(e)  
12 the inverse must also be true, that a subsequent transferee  
13 without knowledge may raise 546(e) as a defense to avoidance,  
14 even whereas here the initial transferee cannot raise the  
15 defense because it had actual knowledge.

16 Your Honor's decision in *Cohmad* recognized that  
17 subsequent transferees have a due process right to challenge  
18 avoidance by asserting defenses available to the initial  
19 transferee, but this Court held there was one caveat to that  
20 rule in the context of 546(e), and this one caveat is the  
21 premise underlying that second part, the second bottom line  
22 ruling, which is that it prevents an innocent subsequent trans  
23 -- it prevents a subsequent transferee with actual knowledge  
24 from raising the defense that belongs to an innocent initial  
25 transferee.



1 As *Cohmad* explains, the one caveat applies when there  
2 is an innocent initial transferee, one without actual  
3 knowledge. Under the normal rule that is when a subsequent  
4 transferee has a due process right to raise defenses to  
5 avoidance. And the answer to -- the reason is because there is  
6 a defense to avoidance that the initial transferee has. The  
7 one caveat operates to restrict the subsequent transferee with  
8 actual knowledge from raising that otherwise valid defense to  
9 avoidance, and this is the only situation where your Honor, in  
10 the *Cohmad* decision, you discussed a subsequent transferee's  
11 actual knowledge of the fraud. Where that subsequent  
12 transferee is attempting to assert the valid defense of an  
13 innocent initial transferee, but if there's no innocent initial  
14 transferee, there's no valid 546(e) to assert by either the  
15 initial or the subsequent. And that's the situation here, your  
16 Honor.

17 There's no innocent initial transferee, and, thus, the  
18 546(e) defense -- there's no 546(e) defense to be asserted to  
19 the avoidance of the initial transfer. The one caveat -- yes,  
20 your Honor?

21 THE COURT: Well, this is not addressed to anything  
22 you're talking about, but I guess I am a little surprised that,  
23 fine, you're right that it's not to your advantage to get this  
24 matter resolved sooner rather than later given this Court's  
25 well-known tendency to move very rapidly. So I guess it's --

1 I'm just wondering, as a practical matter, why, even if you're  
2 totally right, you don't want this matter promptly resolved.

3 MR. FEIL: We would like this matter promptly  
4 resolved, your Honor, but I think you've actually resolved it  
5 already once in a decision you issued almost contemporaneous  
6 with *Cohmad*. And that's a decision in this liquidation that  
7 you issued about 550(a), and I think the principles you laid  
8 out in that decision answered the question here. And I think  
9 your Honor can do that by simply denying their motion and  
10 saying you've answered that previously.

11 And if you like, I can walk you through that decision.  
12 I'm sure you remember it, but it really stands for the  
13 proposition that a subsequent transferee does have a due  
14 process right to assert defenses to avoidance but can only  
15 assert defenses that belong to the initial transferee.

16 And then to speak to what your Honor mentioned earlier  
17 when Mr. Lack was talking, is there is a defense for subsequent  
18 transferees. Congress has not left them in the cold. It's  
19 provided them what I would argue is a superior defense to  
20 546(e), and it's more appropriate. So it's superior because it  
21 applies to all claims. It doesn't matter what the basis for  
22 avoidance was. The defense I'm talking about of course is  
23 550(b). If they can demonstrate that they're an innocent  
24 transferee, they get to keep all of their transfer. It doesn't  
25 matter if it's within the two-year period, outside the two-year

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1 period, whatever the basis for avoidance is. And I would  
2 submit that that's the more appropriate defense for them.

3 546(e) talks about protecting transfers. 550(b) talks  
4 and focuses on a defendant's good faith and lack of knowledge,  
5 and that's essentially what they're arguing is they're saying  
6 we were innocent, we didn't have that knowledge. The  
7 appropriate place for them to make that argument is under  
8 550(b).

9 THE COURT: All right.

10 MR. FEIL: You know, they haven't really gotten into  
11 it today, but they also made a fairness argument. I think it's  
12 sort of the subsumed in what I just said, because the argument  
13 is getting late, I'll defer to my colleague who's going to  
14 address the comments Mr. Gottridge made about the second part  
15 of the argument.

16 THE COURT: That sounds fine.

17 MR. CALVANI: Good afternoon, your Honor. Torello  
18 Calvani from Baker Hostetler.

19 I want to focus my remarks on the second question  
20 presented. On this question, defendants argue that their  
21 knowledge to determine the application of Safe Harbor and  
22 consequently the avoidability of the initial transfer -- shall  
23 I speak up?

24 So on the second question, defendants argue that their  
25 knowledge should control the Safe Harbor and the voidability

1 from the BLMIS to Fairfield Sentry because they too are  
2 qualifying participants with qualifying transactions under  
3 section 546(e).

4 I would like to begin with why there's no substantial  
5 ground for difference of opinion. The bankruptcy court was  
6 correct in rejecting this argument. First, the argument is  
7 defendant's reading of *Cohmad* conflicts with the overall  
8 structure of the Bankruptcy Code's avoidance and recovery  
9 provisions.

10 I want to start very briefly with a couple of basic  
11 principles. One, the transfer the trustee must prove is  
12 avoidable is the transfer of property from debtor, and for  
13 purposes of the Safe Harbor, quote, the only relevant transfer  
14 is the transfer the trustee must seek to avoid. Here that  
15 transfer is the transfer from BLMIS to Sentry, and defendants  
16 do not argue otherwise.

17 Nevertheless, defendants argue that their knowledge  
18 should govern the Safe Harbor and avoidance, but defendants  
19 cited no case in which a court has held a subsequent  
20 transferee's knowledge should determine the avoidability of an  
21 initial transfer. This is because it is well-established that  
22 the concepts of avoidance and recovery are separate and  
23 distinct.

24 Now defendants say they are not conflating avoidance  
25 and recovery. The defendants say in their papers we've put

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1     forth a strawman argument, but, your Honor, I submit they are  
2     conflating avoidance and recovery because they are using a  
3     subsequent transferee's knowledge to determine avoidance.

4             Now, we made these arguments in our opposition, and in  
5     defendant's reply they did something, what I think is  
6     surprising. Now, in the reply, defendants claim that their  
7     proposed appeal over the application of the Safe Harbor is  
8     actually not about the avoidance of the initial transfer. They  
9     claim the proposed appeal, quote, poses no avoidability issue,  
10    and they claim that *Cohmad* is special in that it does not focus  
11    on the avoidability of the initial transfer.

12            Your Honor, I submit that this is an admission that if  
13    the Court applies the traditional framework of avoidance and  
14    recovery as set out in your Honor's 550(a) decision, then the  
15    bankruptcy court was correct in denying their motions to  
16    dismiss and this Court would be correct in denying their motion  
17    for interlocutory appeal.

18            Now, defendant's argument that *Cohmad* is special  
19    because it does not focus on avoidance of initial transfer is  
20    also flatly wrong. *Cohmad* concerns the application of the Safe  
21    Harbor, and the Safe Harbor concerns and focuses on the  
22    avoidance of the initial transfer.

23            Now, the argument that *Cohmad* is somehow different,  
24    special apart from the Bankruptcy Code is similar to an  
25    argument that the defendants made below where they said your

1 Honor was wrong in deciding *Cohmad*. They argue no actual  
2 knowledge defense to the Safe Harbor, because it's not in the  
3 text of the statute. I want to reiterate, however, that *Cohmad*  
4 focuses on the avoidance of the transfer, and there is a  
5 statutory basis for this which is tied to the language and  
6 purpose of statute. If a customer like Sentry knew that  
7 Madoff's customer agreements were a fiction, then we're no  
8 longer talking about a securities transaction and the factual  
9 predicates underlying the Safe Harbor to avoidance do not  
10 exist.

11 Now, your Honor, defendants claim that *Cohmad* provides  
12 a personal defense and that's why it's different, but  
13 avoidability -- avoidability of a transfer is an attribute --  
14 excuse me, avoidability is an attribute of the transfer, not  
15 the parties. Now, avoidability does not change based on  
16 whether there are subsequent transfers or who those subsequent  
17 transfers might be.

18 Defendants concede in their papers that avoidability  
19 is an attribute of the transfer, not the party, under the  
20 Bankruptcy Code, but then they argue that the opposite is true  
21 here. Your Honor, this is also wrong. Avoidability, because  
22 it's an attribute of a transfer, once the transfer is avoided  
23 it does not become unavoided. The transfer might not be  
24 recoverable for a number of reasons, such as a defendant's good  
25 faith, but it does not change that it is avoidable.

1 Now, here Fairfield Sentry's knowledge rebuts the Safe  
2 Harbor and makes the transfer avoidable. Defendants chose to  
3 invest in Fairfield. It wasn't by happenstance. And for  
4 purposes of this motion, defendants do not challenge that  
5 Sentry had actual knowledge of Madoff's fraud. We are all in  
6 agreement here today that Sentry does not have reason to  
7 believe that Madoff was engaged in any securities transactions.

8 This has consequences. Fairfield Sentry's actual  
9 knowledge is an infirmity that travels with the transfer.  
10 Therefore, to accept the defendant's argument that this Court  
11 must disregard Fairfield Sentry's actual knowledge -- well,  
12 there's no basis for it under *Cohmad* or the bankruptcy court --  
13 or the Bankruptcy Code. Excuse me.

14 Now, I would like to discuss for a moment *Ida Fishman*,  
15 because Mr. Gottridge brought it up. When we were before your  
16 Honor ten years ago, in *Katz* and *Grife* we were arguing that the  
17 Safe Harbor should not apply to any of the trustee's claims  
18 because Madoff was operating a Ponzi scheme. In *Katz* and  
19 *Grife*, your Honor squarely rejected this argument. And in *Ida*  
20 *Fishman* you were unanimously affirmed.

21 It is the law of the land that section 546(e) applies  
22 to all of the trustee's cases, because Madoff's agreements with  
23 his customers qualify as securities contracts and his transfers  
24 qualify as settlement payments. But while *Grife* was on appeal,  
25 your Honor decided *Cohmad*, which included the section that

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1 Mr. Gottridge read from at the end of the opinion about  
2 financial institutions and third-party contracts.

3 Your Honor posed a hypothetical where a payment by a  
4 BLMIS customer to a subsequent transferee could in some  
5 circumstances be a qualifying transaction given the language  
6 under section 546(e). Your Honor, we acknowledge that the  
7 definition of a settlement payment or a securities contract  
8 under the statute is broad.

9 We acknowledge there can be more than one securities  
10 contract. We acknowledge that there is more than one way to  
11 activate the Safe Harbor. But, your Honor, this does not mean  
12 that the trustee has to plead the actual knowledge of every  
13 party who may have a third-party securities contract or who  
14 subsequently received a settlement payment down the line.

15 Now, the defendants argue today that under this  
16 Court's hypothetical, Sentry's knowledge is irrelevant, and the  
17 actual knowledge rule should apply to the defendants because of  
18 their own securities contracts. But the focus should remain on  
19 the initial transfer. The subsequent transferees only have an  
20 indirect right to challenge the avoidance. That's the take  
21 away from Judge Bernstein's decision in BMP where defendants  
22 argue that they were securities customers, Judge Bernstein  
23 rejected their argument that the Safe Harbor argument would  
24 apply to entire chain of securities customers.

25 We heard today Judge Morris was the first person to



1 address *Cohmad*. That is incorrect. We cite in our papers the  
2 2018 opinion by Judge Bernstein where he interpreted *Cohmad*,  
3 and we submit was correct.

4 So, as I said before, the trustee plausibly alleged  
5 that Sentry's actual knowledge rebuts the Safe Harbor and that  
6 knowledge cannot be rebutted. The plain meaning of section  
7 546(e) dictates that the relevant transfer is the transfer the  
8 trustee must seek to avoid.

9 Here the end transfer was the transfer from BLMIS to  
10 entry. That transaction was complete when BLMIS deposited  
11 customer property in Sentry's account. Therefore, the focus  
12 should remain on the initial transfer, and to do otherwise  
13 would disregard Sentry's actual knowledge. It would conflate  
14 avoidance and recovery and, frankly, it would be unworkable.

15 I would add further that the language in *Cohmad* about  
16 third-party contracts does not actually say what defendants  
17 needed to say. That even if section 546(e) applies, because of  
18 third-party contracts, then those third parties' actual  
19 knowledge of Madoff's fraud should determine the avoidance of  
20 the initial transfer.

21 This section of *Cohmad* does not mention the actual  
22 knowledge standard, and it certainly does not hold -- it's not  
23 a holding and it does not hold that the existence of a  
24 subsequent transferee's security contract renders the actual  
25 knowledge of the initial transfer moot.

1           So that's what I would submit on the second question  
2 presented. It's late in the day, but I would like to address,  
3 if I may, a couple of the 1292 factors.

4           THE COURT: Okay. Briefly, though.

5           MR. CALVANI: Briefly.

6           THE COURT: Because I have parties here and still  
7 another matter I have to turn to.

8           MR. CALVANI: Thank you, your Honor.

9           I just want to say the defendants cited *In re Flor*, of  
10 course from the Second Circuit. In that opinion, the Court  
11 said the mere presence of a disputed issue that is a question  
12 of first impression standing alone is insufficient to  
13 demonstrate a substantial ground for difference of opinion. If  
14 silence from the circuit is sufficient, interlocutory appeals  
15 would be the norm not the exception.

16           Second, the second question does not present a pure  
17 question of law. This Court would have to study the record and  
18 identify the various third-party contracts. The defendants  
19 have referenced subscription agreements, redemption requests.  
20 Other defendants have addressed Sentry's articles of  
21 association. The Court would have to determine whether these  
22 transfers made by BLMIS to Sentry were in connection with these  
23 contracts.

24           We have over a thousand transfers from Sentry to its  
25 subsequent transferees, so this will be no easy task. Instead,

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1 to the extent it's relevant, it should be done on a complete  
2 record of a bankruptcy court having performed a tracing  
3 analysis.

4 And I would add that -- I guess I'll make this my last  
5 point. Thank you -- that defendants argue below that there is  
6 no actual knowledge exception, so they don't make that argument  
7 here today. So we're going to have to wait for yet another  
8 546(e) appeal, and this is another reason to deny their motion  
9 and wait for a final order, so they can put all their section  
10 546(e) arguments together in one appeal. Otherwise, we're not  
11 just going to have piecemeal litigation, we're going to have  
12 piecemeal appeals on section 546(e).

13 Thank you.

14 THE COURT: Thank you very much.

15 I am sure the appellants want to give a brief  
16 rebuttal, and I will allow that. But I will ask that it be  
17 brief, only because I have another matter.

18 MR. LEVIN: And I will comply with that request, your  
19 Honor.

20 THE COURT: All right.

21 MR. LEVIN: Let me just address *Flor*. In the Banque  
22 Syz' reply brief, we address why we think the trustee miscited  
23 that case. I won't go into it here because of the time.

24 Your Honor asked the question and Mr. Feil addressed  
25 the question: If there's a good faith defense, why do you need

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1 the other defense. I think the answer to that is pretty  
2 simple. If Congress gives defendants two defenses, the Court's  
3 not really in a position to say, well, we don't really need the  
4 one, because Congress gave them the other. And our position is  
5 here Congress gave the defendants here not only the good faith  
6 defense, but the 546(e) defense.

7 And let me go to that, setting it up this way. We  
8 agree with the trustee that the 550(a) decision from this Court  
9 said that the subsequent transferees could assert any defense  
10 that an initial transferee could assert. So an initial  
11 transferee can ordinarily assert a 546(e) defense. Two year  
12 reach back, that's it, not six years. And the 546(e) rule in  
13 the statute is absolute. There are no exceptions.

14 Your Honor made sense of that by saying, yeah, Mr. --  
15 I think it was Feil -- Mr. Calvani said if the defendant  
16 actually knew there was no securities contract, 546(e) should  
17 not be available to that defendant who knew. But look at  
18 *Fishman* and *Katz* and *Grife*.

19 In those cases, the defendants believe that there were  
20 securities contracts, even though there was in fact no  
21 securities being traded and no securities contracts. So the  
22 Second Circuit and this Court both said they get the protection  
23 of the 546(e) defense. The guilty innocent -- I'm sorry, the  
24 guilty initial transferee doesn't.

25 So now take the subsequent transferee who's innocent,

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1 and the initial transferee who's not knowledgeable, let's just  
2 say, for lack of a better term. That subsequent transferee is  
3 in the same position with respect to the whole chain of  
4 transactions that the direct investors were in *Grife* and *Katz*  
5 and *Fishman*, where they believed there were contracts,  
6 securities contracts, even though Madoff was breeching them,  
7 and the mere fact that the initial transferee didn't know they  
8 were there doesn't disable the subsequent transferee from  
9 getting the same protection that the defendants in these other  
10 cases got.

11 As we put in our brief, the trustee should not be  
12 allowed to saddle the innocent with the disabilities of the  
13 guilty. And we think your Honor's ruling about knowledge is  
14 particular to the defense -- to the particular defendant and  
15 not to the whole chain of transactions where you have people  
16 who actually rely on those securities contracts, which is what  
17 546(e) is designed to address.

18 THE COURT: Thank you very much.

19 MR. LEVIN: Thank you, your Honor.

20 THE COURT: I can't take any further argument, but I  
21 do want to thank counsel for both sides for this excellent  
22 argument. Of course I remember these cases like yesterday.

23 MR. LEVIN: As do we, Your Honor.

24 THE COURT: But I will delve into it in more depth and  
25 get you an opinion, or at least a bottom line order, by the end

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1 of the month. I thank you all again, and, if I may, I will ask  
2 you, however, to clear out quickly, because we have another  
3 matter.

4 (Adjourned)